

Preface

Legal argumentation has become one of the prominent research domains of legal philosophy in the last fifty years and its study has deeply influenced this discipline. This is a consequence of three main assumptions which are generally accepted by legal scholars at present days:

(1) Legal language is fundamentally indeterminate because of the plurality of functions that it fulfils in legal activities and institutions, as well as in everyday life;

(2) The indeterminacy of legal language, however, does not prevent legal interpretation and adjudication from being "rational", "reasonable", "just", "correct";

(3) In fact the criteria of rationality, reasonableness, justice and correctness which apply to legal interpretation and adjudication consist in, or are expressed by, rules governing a linguistic practice: the practice which aims at justifying, in a public context, that thus-and-so ought to be the case according to the law.

Although this is largely undisputed by legal philosophers, the following issues among others remain highly controversial: (1) what the nature of legal indeterminacy is; (2) what kind of rationality applies in the legal domain; (3) how the rules governing legal argumentation, if any, can be properly singled out and analyzed.

An original and promising way to address these issues has been recently supplied by Robert Brandom's semantic inferentialism. Brandom's inferentialist project – which goes from *Making It Explicit* of 1994 to the recent *Reason in Philosophy: Animating Ideas* of 2009 – gives a unified picture of the problems of linguistic indeterminacy, of the sources of rationality, and of the structure of argumentative practices. According to this picture, if we apply it to the legal domain, (1) the content of a legal provision is given by the set of inferences this provision is involved in within legal argumentation; (2) the inferential articulation of a legal provision is governed by rules; (3) these rules determine the normative status of the participants in a linguistic practice and express the criteria of rationality, reasonableness, justice and correctness which characterize a social community. Might these claims, which find their origin in the tradition of Amer-

ican pragmatism, provide a new basis for a fruitful insight into legal argumentation?

In order to address this issue, the Editors of this volume, with the contribution of Michael Esfeld from the University of Lausanne, developed from 2004 to 2006 a research project sponsored by Bocconi University in Milan, which aimed at exploring the possibility of an "inferentialist account" of legal argumentation. More generally, the research sought to determine (i) whether an inferentialist account can explain some general aspects of legal reasoning and legal decision-making; (ii) whether the study of legal practice can contribute to some aspects of an inferentialist theory of content and reasoning.

The results of this research were discussed with several scholars engaged in the study of language and argumentation, in the occasion of an international conference held in Milan, at Bocconi University, on October 5-6, 2006. This book contains the (revised versions of the) papers presented at that conference; three further papers have been included in the book, in order to enrich the analytical and critical picture of "legal inferentialism" presented here.

The book is divided into two parts. The first one, *Inferentialism on Debate*, aims at discussing some aspects of Brandom's inferentialist project that are relevant for the study of argumentation.

On the basis of the distinction between what is said and what is implicated in linguistic communication, Carlo Penco considers, in Chapter 1, to what extent one is committed to what she does not say, and to what point one is bound to recognize the consequences of what she says: It is the problem of our inferential responsibility and its limits. In Chapter 2, Michael Esfeld looks at the sources of the normative status that Brandom attributes to meaning and content. This issue leads the Author to discuss the relationship between naturalism, cognitivism and the naturalistic fallacy, and to propose a naturalistic explanation of the sources of normativity. In Chapter 3 Italo Testa firstly takes into account the philosophical debate between Robert Brandom and Jürgen Habermas, which highlights some relevant concerns for the inferentialist project as to the social basis of normativity and content. Starting from this account, the Author then looks at the relationship between recognition and normativity, on the one hand, and recognition and criticism, on the other. Chapter 4, by Giorgio Bongiovanni, Antonino Rotolo and Corrado Roversi, is devoted to the evaluation of an inferentialist approach with respect to the relationship between law and morality. On the basis of Robert Alexy's pragmatic foundation of this relationship – i.e. the "claim-to-correctness" thesis –, the Authors discuss some problematic aspects of Bran-

dom's account which are related to the role of cooperation in practical reason and to the notion of disagreement. In Chapter 5 the Editors of this volume give an example of inferentialist analysis of legal argumentation by reconstructing the normative commitments and entitlements which are undertaken by two lawyers in the discussion of a legal case. This analysis permits to show the advantages and drawbacks of an inferentialist approach in legal argumentation theory.

The aim of the second part of the book, *Inferentialism, Argumentation and Pragmatism*, is to consider legal inferentialism within the manifold tradition of pragmatism both from a historical and a theoretical point of view (Chapters 6 and 7), and to confront it with other approaches to the study of legal argumentation which have a similar background (Chapters 8, 9 and 10).

In Chapter 6 Pascal Engel focuses on the relationships between epistemology and ethics from a "genealogical" point of view, taking into consideration some theories of what he calls the "norms of thought", from Kant to the beginning of the 20th century. Chapter 7 is devoted to the relevance of logic in the legal domain: in particular, Susan Haack reconstructs the anti-formalist stance of the classical legal pragmatism at the end of the 19th and beginning of the 20th century, and highlights its topical interest with regard to the contemporary achievements in the philosophy of logic. In Chapter 8 John Woods takes into account the consequences of the contemporary "pragmatic turn" in the study of legal argumentation as to the problem of evidence in criminal law. The Author analyzes the influence of actors and context on evidentiary inference and its abductive structure. In Chapter 9 Eveline Feteris presents a pragma-dialectical approach to the study of legal argumentation and uses it in order to clarify the features, and to evaluate the consequences, of teleological-evaluative argumentation in the legal domain. In Chapter 10, finally, Andrea Rossetti presents a linguistic analysis of the Italian verb "dovere" which shows how the different functions of this verb depend on the set of inferences it can be entailed by in a given reference context.

To conclude, we would like to warmly thank the Authors for their patience and valuable help in realizing this book, and Bocconi University for the financial support provided for its publication.

Damiano Canale and Giovanni Tuzet

NOTE ON CONTRIBUTORS

GIORGIO BONGIOVANNI is professor of philosophy of law at the University of Bologna Law School. He is associate editor of "Ratio Juris. An International Journal of Jurisprudence and Philosophy of Law". His publications include: *Reasonableness and Law* (co-edited with G. Sartor and C. Valentini, 2009), *Oggettività e morale* (2007), *Costituzionalismo e teoria del diritto* (2005) and several papers on constitutional theory, legal theory, and metaethics and practical reason.

DAMIANO CANALE is full professor of Philosophy of Law at Bocconi University, Milan. His research interests cover philosophy of language, legal argumentation, history of legal and political concepts, bioethics. He is author of *La costituzione delle differenze. Giusnaturalismo e codificazione del diritto civile nella Prussia del '700* (2000); *Forme del limite nell'interpretazione giudiziale* (2003); and co-editor with P. Grossi and H. Hofmann of *A History of Philosophy of Law in the Civil Law World, 1600-1900* (2009). His papers on legal theory and legal argumentation have been published in "Ratio Juris", "Informal Logic" and "Argumentation".

PASCAL ENGEL is ordinary professor of contemporary philosophy at the University of Geneva. He has written on the philosophy of logic, of language and of mind, and on epistemology. Among his books are *The Norm of Truth* (1991), *Davidson et la philosophie du langage* (1994), *Philosophie et psychologie* (1996), *Truth* (2002), *Ramsey: Truth and Success* (with J. Dokic) and *Va savoir* (2007).

MICHAEL ESFELD is full professor of epistemology and philosophy of science at the University of Lausanne (Switzerland) since 2002. His main areas of research are the philosophy of mind and the philosophy of science, in particular physics. His current research projects focus on reductionism, mental causation, the causal theory of properties, causation in physics, and structural realism. His books include *Naturphilosophie als Metaphysik der Natur* (2008), *Holism in Philosophy of Mind and Philosophy of Physics* (2001) as well as introductory books to the philosophy of mind and the philosophy of science in French and German.

EVELINE T. FETERIS is associate professor at the Department of Speech Communication, Argumentation Theory and Rhetoric, University of Amsterdam. Her research interests cover legal argumentation, argumentation theory, legal theory and legal philosophy. Her major publications include *Dialectical Legal Argument: Formal and Informal Models* (special issue of "Artificial Intelligence and Law", 2000, with H. Prakken), *Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions* ("Argumentation", 2008),

The Rational Reconstruction of Weighing and Balancing on the Basis of Teleological-Evaluative Considerations ("Ratio Juris", 2008).

SUSAN HAACK is Distinguished Professor in the Humanities, Cooper Senior Scholar in Arts and Sciences, Professor of Philosophy and Professor of Law, University of Miami. Her books include *Philosophy of Logics; Evidence and Inquiry; Deviant Logic, Fuzzy Logic; Manifesto of a Passionate Moderate; Defending Science – Within Reason; Pragmatism Old and New; and Putting Philosophy to Work*. Her legal scholarship has been primarily on issues in evidence law (especially the law of scientific evidence) and on legal pragmatism.

CARLO PENCO teaches philosophy of language at the University of Genoa. His main research areas are Philosophy of Language, Communication Theory and the Foundations of Cognitive Science, and Artificial Intelligence. Recent publications include an introduction to the philosophy of language (2008), *Explaining the mental* (2007) and papers published in "History and Philosophy of Logic", "Modern Logic", "Pragmatics & Cognition", "Topoi".

ANDREA ROSSETTI is professor of philosophy of law at the University of Milan-Bicocca, where he also teaches legal informatics. His works concern the possibility of the use of formal systems for the expression of the law and the ontology of social and intangible objects (*Deontica in Jean-Louis Gardies. Logica e ontologia degli atti sociali*, 1999; *Modi deontici nei sistemi giuridici*, 2004). Currently his studies focus on the concept legal document. Since 1999, he deals with legal informatics; in particular, he has devoted several essays to the idea of openness in the ICT.

ANTONINO ROTOLO is associate professor of philosophy of law at the University of Bologna Law School. He is a member of CIRSIFID (Centre for Research in History of Law, Philosophy and Sociology of Law, and Computer Science and Law) at the University of Bologna. He published two monographic volumes about reasoning by analogy in the law (2001) and multi-modal logics for modeling the interaction between agents and normative systems (2002). He has also extensively written on normative reasoning, law and logic, logics for artificial Intelligence and law, and formal methods for practical reasoning.

CORRADO ROVERSI is currently lecturer in legal philosophy at the University of Bologna. He has a degree in philosophy from the University of Bologna and a doctorate in analytic philosophy and general jurisprudence from the University of Milan. He is a member of CIRSIFID (Centre for Research in the History, Philosophy, and Sociology of Law, and in Computer Science and Law) at the University of Bologna. He has written one monograph and several papers on social

and legal ontology, the theory of norms and normativeness, and the philosophy of normative language.

ITALO TESTA is assistant professor of history of political philosophy at the University of Parma. He is author of *Hegel critico e scettico* (2002), *Teorie dell'argomentazione* (2006), *Ragione impura* (2006), and co-editor of *Hegel contemporaneo* (2003), *Lo spazio sociale della ragione* (2009). Recent articles include *Selbstbewusstsein und zweite Natur*, in *Hegels Phaenomenologie des Geistes* (2008); *Criticism from within nature. The dialectic from first to second nature between McDowell and Adorno*, in "Philosophy and Social Criticism" (2007).

GIOVANNI TUZET is assistant professor of philosophy of law at Bocconi University. His areas of interest cover epistemology, philosophy of logic, normative sciences and legal argumentation. His writings include *La prima inferenza* (2006), *Projectual Abduction* ("Logic Journal of the IGPL", 2006) and, with D. Canale, *On Legal Inferentialism* ("Ratio Juris", 2007), *On the Contrary: Inferential Analysis and Ontological Assumptions of the A Contrario Argument* ("Informal Logic", 2008), *The A Simili Argument: An Inferentialist Setting* ("Ratio Juris", 2009), *What is the Reason for This Rule? An Inferential Account of the Ratio Legis* ("Argumentation", forthcoming).

JOHN WOODS is director of the Abductive Systems Group at UBC and Charles S. Peirce Professor of Logic in the Logic and Computational Sciences Group at King's College London. Recent writings include *Paradox and Paraconsistency* (2003), *Agenda Relevance* (2003) and *The Reach of Abduction* (2005), the latter two with Dov Gabbay. *Seductions and Shortcuts: Error in the Cognitive Economy* is forthcoming in 2010.

NOTE ON CONTRIBUTIONS

Some sections of the Editors' Chapter are taken from their papers *Interpretive Scorekeeping*, in "Analisi e diritto 2005", Turin: Giappichelli, 2006, pp. 81-97, and *On Legal Inferentialism*, in "Ratio Juris", Vol. 20, 2007, pp. 32-44.

A French and shorter version of Pascal Engel's Contribution was published in "Revue de théologie et de philosophie", N. 140, 2008, pp. 29-47.

The Chapter by Susan Haack is reprinted from "Ratio Juris", Vol. 20, 2007, pp. 1-31.

All the other writings collected in this Volume are previously unpublished.